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that a new trial should not be granted upon affidavit "that during the trial, or at least a portion of it, one of the jurors was to all appearances asleep." *Pelham v. Page*, 6 Ark. (1 Eng.), 535. Nor is it ground for a new trial where the juror made affidavit that he had a habit of listening with his eyes closed and that he heard what was said by witnesses and counsel. *Continental Casualty Co. v. Semple*, (Ky.) 112 S. W., 1122. It was also held that an appellant cannot complain that a juror slept during argument of counsel, when he did not request the Court to awaken him. *Slaughter v. Coke County*, 34 Tex. Civ. App., 598. Mere conjecture or surmise that the jury acted improperly never requires the granting of a new trial. *McWhorter v. Haigler Mercantile Co.*, (Ala.) 58 So., 790. In case of misconduct of the jury the complainant must call it to the attention of the Court immediately; he may not speculate upon the verdict. *Shepherdson v. Clopine*, 83 Neb., 764; *Ulmer v. Seelman*, 159 Mich., 253; *Woods v. Klein*, 223 Pa., 257. The decision of the principal case is sound in the doctrine it announces that one cannot complain of the misconduct of the jury, unless he does so at the time it happens and shows that he has probably been injured thereby.

MASTER AND SERVANT—"FELLOW SERVANTS"—EMPLOYEES ON DIFFERENT TRAINS.—*CHESAPEAKE & O. RY. CO. v. BROWN ET AL.*, 153 S. W. (Ky.), 753.—*Held*, that a brakeman on one train was not a fellow servant of the operatives of another train on the same railroad, by whose negligence he was injured.

The rule most generally followed is that all are fellow servants who are in the same service, and subject to the same general control, even though in different grades and departments. *Farwell v. Boston R. Co.*, 4 Met. (Mass.), 49; *Brown v. Winona, etc., R. Co.*, 27 Minn., 338. Under this rule trainmen working on different trains for the same railway company must be considered fellow servants. *Vermillion v. Balt. & O. R. Co.*, 38 App. D. C., 434; *Mellish v. Pere Marquette R. Co.*, 167 Mich., 86; *Ham v. St. Louis & S. F. R. Co.*, 136 Mo. App., 17. It has even been held that train crews of one railroad company running over the track of another, under the complete control of an employee of the latter, are fellow servants of the train crews of the latter company. *Johnson v. Wheeling Terminal Ry. Co.*, 65 W. Va., 415. Some States, however, hold that for persons to be fellow servants they must work in the same grade or department so as to afford them the power and opportunity of exercising a mutual influence over each other promotive of proper caution. *Thompson v. Northern Hotel Co.*, 99 N. E. (Ill.), 878; *Missouri Pac. R. Co. v. Dwyer*, 36 Kan., 58; *Pittsburg R. Co. v. Devinney*, 17 Ohio St., 197. Under this rule the train crews of different trains have been held not fellow servants. *Chicago, etc., R. Co. v. House*, 172 Ill., 601; *Cincinnati, etc., R. Co. v. Roberts*, 110 Ky., 856. Motormen of different cars operated by a street railway company have been held not fellow servants. *Louisville Ry. Co. v. Haynes*, 128 S. W. (Ky.), 1055. But *contra*, *Birmingham Ry., etc., Co. v.*

Moseley, 164 Ala., 111. These last cases are in accord with the modern tendency of legislation to increase the employers' liability. It is becoming universally recognized that the welfare of society is best promoted by the most liberal policy towards workmen, and therefore wherever practicable the definition of fellow servants should be restricted. In the case of train crews on different trains, however, it would seem better to regard them still as fellow servants. "Being engaged in the same kind of service, they must naturally be often thrown into contact, and have ample opportunities for mutual supervision." Justice Brewer in *Howard v. Denver, etc., R. Co.*, 26 Fed., 837. To make the employer liable and responsible for the negligence of fellow servants would unavoidably lead to carelessness and negligence which would not otherwise result; and in the case of railroad employees, who have charge over the safety of all who ride over the road, it is essential that they preserve the highest degree of care and caution in their work. To hold the train crews of different trains fellow servants would tend to prevent negligence, where it is most essential that it be prevented.

MASTER AND SERVANT—INJURIES TO SERVANT—DISOBEDIENCE OF RULES.—SOUTHERN BELL TELEPHONE AND TELEGRAPH CO. v. SHAMOS, (GA.), 76 S. E., 1083.—A telephone company waived a rule requiring its employes to wear rubber gloves and rubber coats by knowingly permitting work to be done without them.

The general rule is that where an employe disobeys a reasonable rule of his employer and suffers injury thereby, he cannot recover. *Nordquist v. Great Northern Ry. Co.*, 89 Minn., 485; *St. Louis, I. M. & S. Ry. Co. v. Caraway*, 77 Ark., 405; *Smith v. Foster*, 93 Ill. App., 138; *Western Mattress Co. v. Ostergaard*, 71 Neb., 572. But such rules are binding only on employes who have knowledge of them. *Little v. Southern Ry. Co.*, 120 Ga., 347; *Humphreys v. Raritan Copper Works*, 60 A. (N. J.), 62. It is not necessary that the disobedience be willful or intentional; it is enough if there is a failure to use ordinary care. *Chicago & A. R. Co. v. Stevens*, 80 Ill. App., 671. It was held in Texas that breach of a rule was not negligence *per se* unless the act was one so opposed to the dictates of common prudence that no careful person would commit it. *Galeuston, H. & S. A. Ry. Co. v. Cherry*, 98 S. W., 898. Nor is a servant excused where his disobedience is obviously dangerous, though the rule is habitually disobeyed by employes. *Eldorado & B. R. Co. v. Whatley*, 114 S. W., (Ark.), 234. Neither can the disobedience of a rule by one servant excuse another for disobeying a rule. *Mo., K. & T. Ry. Co. v. Collier*, 157 Fed., 347. Disobedience of a master's rule is still negligence *per se* though a superior servant of the master is present. *N. Y. C. & St. L. R. Co. v. Rapp*, 81 N. E. (Ohio), 748. But it is otherwise if he acts under a foreman. *Wiley v. St. Joseph Gas Co.*, 132 Mo. App., 380. A servant cannot justify disobedience on the grounds that the rule was unnecessary or that he adopted another equally safe. *Gilbourne v. Oregon Short Line R. R. Co.*, 114 P. (Utah), 532. But it was held in Georgia that he could show that